

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MARIA T. VELAZQUEZ

Claimant

VS.

IBP, INC.

Respondent

Self-Insured

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Docket No. 168,347
& 169,293

ORDER

Claimant appeals from an Award rendered by Administrative Law Judge William F. Morrissey, on June 20, 1995. The Appeals Board heard oral arguments on October 26, 1995. Jeff Cooper has been appointed Appeals Board Member Pro Tem for this particular case to serve in place of Board Member Gary Korte who recused himself from this proceeding.

APPEARANCES

The claimant appeared by and through her attorney, C. Albert Herdoiza of Kansas City, Kansas. Respondent, a self-insured, appeared by and through its attorney, Joseph W. Hemberger of Kansas City, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The Appeals Board has reviewed and considered the record listed in the Award and also considered the deposition of Rodolfo Garcia taken November 1, 1994, which was omitted from the recitation of the record in the Award. The Appeals Board also adopts the Stipulations listed in the Award.

ISSUES

1. The nature and extent of claimant's disability.
2. Claimant's entitlement to vocational rehabilitation.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments of the parties, the Appeals Board finds that the claimant suffered a 4.38 percent permanent whole body functional impairment in Docket No. 168,347 and a 4.38 percent permanent whole body functional impairment in Docket No. 169,293 as a result of accidental injury arising out of and in the course of her employment with respondent.

Claimant was injured twice in the course of her employment with the respondent. The first occurred on April 24, 1991, and the second injury on May 1, 1992. On April 24, 1991, claimant was trying to free a bone that had stuck in a conveyor belt and, in the process, experienced pain in her neck and down her right arm. Treatment was provided by Marvin D. Snowbarger, M.D., and later by Edward G. Campbell, M.D. Although she received physical therapy and conservative care, claimant missed no time from work and continued to work her regular job up until the second injury.

On May 1, 1992, while lifting a tray of meat overhead, claimant dropped the tray and developed pain in her neck, right shoulder and arm. Following the May 1, 1992, injury, the claimant returned to her regular work and continued to perform her regular duties until June 11, 1992, when she was terminated from the employment of the respondent based on an altercation between claimant and another employee.

Her discharge from employment was for violating a company rule against fighting on company premises. The testimony regarding the reasons for the termination is controverted. The supervisor of rendering, Carl Cannon, testified that through an interpreter the claimant admitted to him that she had slapped a co-employee. Witnesses who testified on behalf of the claimant indicated the fight was initiated by the other employee and, further, that they did not see claimant strike the other employee. In applying for unemployment, the claimant signed a form indicating that she was discharged because she hit a co-worker with her hand. While the claimant's involvement in the altercation is unclear, it is readily apparent that her discharge was related to violation of a company rule and had nothing to do with her work-related injuries.

In Acklin v. Woodson County, Docket No. 147,322, May 30, 1995, the Appeals Board employed the policy considerations announced in Fouk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995) and held that the claimant was not entitled to claim work disability where the claimant was terminated from his employment for cause. The Appeals Board, after reviewing the evidence in this case, including the unemployment form and testimony from all the parties, finds that the claimant's separation from work was for cause. Based upon claimant's demonstrated ability to earn

a comparable wage together with the finding of termination for cause, the claimant is not entitled to work disability. Also worth mentioning is the fact that the claims for compensation and claims for work disability were not made until after the termination for cause. This is further evidence that her injuries were not disabling her from working.

As of the date the claimant was terminated, she was still employed by the respondent in her same job, being paid the same wages. K.S.A. 1990 Supp. 44-510e(a) provides in part:

“There shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury.”

Since the claimant continued to work her normal job following her first injury and for nearly a year following that until the May 1, 1992, injury, there is no basis for a work disability claim for that injury. Following the May 1, 1992, injury the claimant continued to work for the respondent in the same capacity at the same wages until she was discharged for reasons not related to the injury. The Appeals Board finds that the presumption of no work disability should be applied to this case and that the claimant has not produced evidence sufficient to overcome the presumption.

With regard to vocational rehabilitation, the same logic applies. The claimant's present unemployment was not due to the injuries but, rather, to violation of company policies and termination for cause. As such, vocational rehabilitation at the respondent's expense is not appropriate.

The claimant is entitled to permanent partial disability benefits based upon the agreed functional permanent partial impairment of 4.38 percent for each injury pursuant to the stipulation of the parties.

The findings and conclusions made by the Special Administrative Law Judge William F. Morrissey not inconsistent with the findings and conclusions of the Appeals Board herein, are hereby adopted by the Appeals Board as its own.

AWARD

Docket No. 168,347

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Maria T. Velazquez, and against the respondent, IBP, Inc., a self-insured, for an accidental injury which occurred April 24, 1991, and based on an average weekly wage of \$382.59, for 415 weeks of compensation at the rate of \$11.17 per week in the sum of \$4,635.55 for 4.38% permanent partial general body disability.

As of October 30, 1996, there is due and owing claimant 288 weeks of permanent partial disability compensation at the rate of \$11.17 per week in the sum of \$3,216.96.

The remaining 127 weeks are to be paid at the rate of \$11.17 per week until fully paid or further Order of the Director.

Future medical benefits will be awarded only upon proper application to and approval of the Director. Unauthorized medical expense of up to \$350 is ordered paid to or on behalf of the claimant upon presentation of proof of such expense.

AWARD

Docket No. 169,293

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Maria T. Velazquez, and against the respondent, IBP, Inc., a self-insured, for an accidental injury which occurred on May 1, 1992, and based on an average weekly wage of \$382.59, for 19 weeks of temporary total disability compensation at the rate of \$255.07 per week in the sum of \$4,846.33 and 396 weeks of compensation at the rate of \$11.17 per week in the sum of \$4,423.32 for 4.38% permanent partial general body disability making a total award of \$9,269.65.

As of October 30, 1996, there is due and owing claimant \$4,846.33 in temporary total compensation and 234.71 weeks of permanent partial disability compensation at the rate of \$11.17 per week in the sum of \$2,621.71 making a total due and owing of \$7,468.04 less compensation paid.

The remaining 161.29 weeks are to be paid at the rate of \$11.17 per week until fully paid or further Order of the Director.

Future medical benefits will be awarded only upon proper application to and approval of the Director. Unauthorized medical expense of up to \$350 is ordered paid to or on behalf of the claimant upon presentation of proof of such expense.

Claimant's attorney fee contract is hereby approved insofar as it is not inconsistent with K.S.A. 44-536.

Fees necessary to defray the expenses of administration of the Kansas Workers Compensation Act are hereby assessed to the respondent to be paid direct as follows:

William F. Morrissey
Special Administrative Law Judge

\$150.00

Nora Lyon & Associates	
Transcript of Preliminary Hearing	\$201.04
Curtis, Schloetzer, Hedberg, Foster & Associates	
Transcript of Regular Hearing	\$402.10
Appino & Biggs Reporting Service	
Deposition of Maria Velazquez	\$ 53.20
Deposition of Carl Cannon	\$ 74.40
Deposition of Rodolfo Garcia	\$ 99.00
Taylor Reporting Service	
Deposition of Edward J. Prostic, M.D.	\$230.80
Deposition of Michael J. Dreiling	\$426.70

IT IS SO ORDERED.

Dated this _____ day of October, 1996.

BOARD MEMBER PRO TEM

BOARD MEMBER

BOARD MEMBER

c: C. Albert Herdoiza, Kansas City, KS
Joseph W. Hemberger, Kansas City, KS
IBP, Inc., Legal Dept., Dakota City, NE
Jeff Cooper, Topeka, KS
Floyd V. Palmer, Administrative Law Judge
Philip S. Harness, Director